In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1102

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 57, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1972. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to February 10, 1973, and on February 9, 1973, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the grand jury subpoena *duces tecum* in this case was unduly broad.

2. Whether the district court abused its discretion by impounding within its custody Union records needed for a

grand jury investigation into the Union's affairs and for the trial of a case involving charges of embezzlement of the Union's funds.

STATEMENT

1. On March 24, 1971, petitioner's motion to quash or modify a subpoena *duces tecum* (D. App.[1] 2-5; Pet. 4-5) issued on March 19, 1971, by a grand jury investigating possible misappropriation of petitioner's funds was denied by the United States District Court for the District of Rhode Island. The subpoena required production of certain Union financial records covering a period from January 1, 1966, to December 31, 1970. On April 1, 1971, petitioner complied with the subpoena, and as a result of investigation into these records three Union officials—John A. White, Jr., Business Manager and President of the Union; John A. White, Sr., his father and former Business Manager of the Union; and Edwin L. Sullivan, a Union Guard—have been indicted for conspiracy and embezzlement of Union funds in violation of 29 U.S.C. 501(c) and 18 U.S.C. 371 (Indictment 7846, G. App. 1-16). John A. White, Sr., and Dennis Raimondi have also been indicted for conspiracy and obstruction of justice by destroying Union records in violation of 18 U.S.C. 371, 1505, and 2 (Indictment 7757, G. App. 17-22). The conspiracy and obstruction of justice indictment was issued by the grand jury that subpoenaed the records and the conspiracy and embezzlement indictment was returned by a second grand jury. Other possible violations are still under investigation by a third grand jury.

2. The grand jury that subpoenaed the records was discharged on September 8, 1971 (D. App. 56). The subpoenaed records were not returned to petitioner but instead were submitted to the second grand jury investigating Union affairs, which had been sworn on October 19, 1971. In a letter dated November 18, 1971, petitioner requested that the United States Attorney for Rhode

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[1] "D. App." refers to the petitioner's appendix in the court of appeals; "G. App." refers to the government's appendix.

Island return the subpoenaed records (D. App. 57); and on May 18, 1972, a similar request was made by petitioner's Recording Secretary (D. App. 58). On May 31, 1972, the government attorney in charge of the case replied in a letter stating that the records could not be returned since they were needed as part of the investigation being conducted by the second grand jury but would be returned immediately after they were no longer needed (D. App. 59).

On June 16, 1972, petitioner filed a motion with the district court for the return of the subpoenaed records (D. App. 60-61). In response the government moved on July 10, 1972, to have the records impounded because they were needed for the prosecution of the officials indicted for conspiracy and embezzlement (Indictment 7846, *supra*). Also during the second week of July 1972, the third grand jury issued a subpoena *duces tecum* identical to the original subpoena of March 19, 1971 (D. App. 77).[2]

At the hearing on these motions held on July 17, 1972, government counsel noted that certain membership lists had already been returned (Tr. 12-13) and stated further that return of the records to the Union was not feasible because records previously returned had been destroyed by Union officials;[3] the government also contended that return of those records not essential to the investigation, and the copying of additional records, would require the

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[2] After the court granted the government's motion to impound, this subpoena was withdrawn as unnecessary (Appellant's Brief 38).

[3] This incident is described in the "obstruction of justice" Indictment (Indictment 7757, G. App. 17-22). The Indictment alleges that on or about April 14, 1967, to on or about May 4, 1967, John A. White, Sr., Dennis Raimondi, and William F. Lynch caused certain Union papers to be removed from a law office to the residence of John A. White, Sr.; that the accused reported that the automobile of John A. White, Sr., had been stolen containing the documents; and that the accused instead had burned the documents in order to avoid a summons served on John A. White, Sr., by the Internal Revenue Service as part of the Service's investigation of the tax liability of Local 57, which was then pending (G. App. 17-22). Dennis Raimondi has already pleaded guilty to the conspiracy count.

government to divulge its case.[4] Government counsel also observed that since the third grand jury had already subpoenaed the records it would be useless for the court to relinquish the records to the Union and then have them returned under the subpoena (Tr. 17-18), and he stated that although not all records were needed for prosecution under the indictments, he could not speak for the grand jury's needs (Tr. 18). Indeed, at that time the records were being used by auditors assisting that grand jury in an attempt to piece together an overall picture of the official management of the Union's affairs.

After the district court had denied petitioner's motion for return of the documents and granted the government's motion for impoundment until disposal of the prosecution under Indictment 7846, counsel for petitioner requested the court to include a provision in the order that representatives of the Union could have access to the records.[5] At that time the government assured the court that such access would be provided, and the court stated to petitioner that if the government should fail to allow it access, it should bring the matter to the court's attention,

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[4] Additionally, in response to Union counsel's statement that the indicted officials needed access to the records, government counsel noted that the accused officials had moved for a bill of particulars, which the court had granted in part, that the accused had been granted a motion for discovery of the impounded documents (G. App. 23-28), and that the government was complying with the orders for a bill of particulars and discovery (Tr. 15).

[5] After the court had impounded the records, it transferred their custody to the government for use before the grand jury and in the prosecution. See *Perlman* v. *United States*, 247 U.S. 7, 15. They are held by the Organized Crime Strike Force attorney in the same building as the district court.

and it would take appropriate action (Tr. 22). No such complaint has ever been made to the district court by petitioner.[6]

ARGUMENT

1. The initial subpoena, demanding specific records of the Union for a five-year period prior to December 31, 1970,[7] was not oppressive, unreasonable, or overbroad. The courts below properly so found on the facts of this case, applying what is uniformly conceded to be the correct—case by case—approach. Cf. *Petition of Borden Co.*, 75 F. Supp. 857 (N.D. Ill.) (grand jury subpoena calling for production of 50 tons of records covering a 20-year period, sustained); *In re United Shoe Machinery Corp.*, 7 F.R.D. 756 (D. Mass.) (subpoena for "huge quantities of material" sustained; pertinent time period reduced from 27 to 10 years); *Application of Radio Corp. of America*, 13 F.R.D. 167 (S.D. N.Y.) (18 years); see also *Application of Certain Chinese Family B. & D. Ass'ns*, 19 F.R.D. 97, 100 (N.D. Calif.) (the "fact that all of the records are demanded does not in and of itself make the subpoena unreasonable or oppressive"). Nor does the subpoena fall within the dictum in *Hale* v. *Henkel*, 201 U.S. 43, 77, as petitioner contends, since that case involved an anti-trust investigation where the subpoena demanded production of all documents passing between the corporation and six other companies, in addition to all correspondence since its incorporation, with more than a dozen other companies.

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[6] During oral argument in the court of appeals counsel for petitioner asserted that the Union was being denied access to the records by the government. The government noted that the petitioner had free access to these records and that representatives of the Union had examined them on several occasions. Counsel for petitioner was thereafter unable to answer the court's inquiry why, if the Union was being denied free access to the records, he had not called the matter to the district court's attention as the district court had instructed him.

[7] These records fill about 12 cartons or 12 file drawers and consist of receipts, vouchers, membership cards, etc., of such a volume that copying all of them would be virtually impossible.

Nor is there any requirement, as petitioner contends, that there must be a preliminary showing of the relevance of the subject matter of the subpoena to the grand jury's investigation. See, *Branzburg* v. *Hayes*, 408 U.S. 665, 688, 701. It is well-established that a grand jury is not required to designate the materials in its subpoenas that will conform to what its exact needs may ultimately turn out to be. *Schwimmer* v. *United States*, 232 F. 2d 855, 862 (C.A. 8), certiorari denied, 352 U.S. 833. Moreover, any such requirement would be especially inappropriate in this case, since the grand jury that subpoenaed these records was involved in investigating violations of Chapter 11, Title 29, U.S. Code, dealing with the fiduciary relationship of union officers to its members (see 29 U.S.C. 501).[8] Therefore petitioner's contention, that a preliminary showing of the grand jury's need is required, is without merit. The defect is petitioner's contention is illustrated by its reliance on the Seventh Circuit's decision in *In re Dionisio*, 442 F. 2d 276, and *In re September 1971 Grand Jury*, 454 F. 2d 580, which this Court reversed *sub nom. United States* v. *Dionisio*, No. 71-229, and *United States* v. *Mara*, No. 71-850, both decided January 22, 1973, holding that no preliminary showing of need must be made before enforcement of a grand jury subpoena.[9]

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[8] Under Chapter 11 it is a union which has the burden of showing records subpoenaed for investigation into the union's affairs by the Secretary of Labor are not relevant. *Local 57, International Union of Operating Engineers* v. *Wirtz*, 346 F. 2d 552, 556 (C.A. 1); see also *Local 57, International Union of Operating Engineers*, 326 F. 2d 467 (C.A. 1) (Secretary of Labor not required to show probable cause). A grand jury's investigative authority would be at least as broad. See *Branzburg* v. *Hayes*, 408 U.S. 665, 688, 701.

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[9] It is arguable in any event, that having failed to contest the original subpoena in a contempt proceeding, this issue is not even available to petitioner on appeal. See *United States* v. *Ryan*, 402 U.S. 530-532; *Cobbledick* v. *United States*, 309 U.S. 323.

2. There is similarly no merit to petitioner's contention that there was no basis for the district court's impoundment order. The power of a court to impound documents by taking them into its custody is inherent and lies within the court's discretion. See *United States* v. *Ponder*, 238 F. 2d 825, 827 (C.A. 4); *United States* v. *Birrell*, 242 F. Supp. 191, 202 (S.D. N.Y.); 8 Wigmore, *Evidence* (McNaughton ed., 1961), Sec. 2200, pp. 131-132; Hagan, *Impounding and the Subpoena Duces Tecum*, 26 Brooklyn L. Rev. 199, 229-230 (1960). Here records which had been produced pursuant to the subpoena duces tecum were taken into the court's custody—its immediate, but not final, care and control—for the purpose of protecting them for pending grand jury investigation into Union affairs and for the pending trial of Union officials based upon them. In *United States* v. *Birrell, supra*, 242 F. Supp. at 202, the court reviewed various cases involving impoundment of documents and concluded that: "some of the reasons which might constitute a proper showing for an impounding order *after* the records are produced in Court (for example, under a subpoena), are [1] the existence of grounds to fear the disappearance of the records or their alteration, [2] necessity for use of the records in subsequent criminal proceedings * * *, [3] necessity for Court custody to permit examination by numerous interested parties, and the like." Accord, *Perlman Rim Corp.* v. *Firestone Tire and Rubber Co.*, 244 Fed. 2d 304 (S.D.N.Y.), affirmed *sub nom. Perlman* v. *United States*, 247 U.S. 7; *United States* v. *Ponder*, 238 F. 2d 825 (C.A. 4), *United States* v. *Maryland and Virginia Milk Producers Ass'n*, 151 F. Supp. 438 (D.D.C.), modified, 250 F. 2d 425; *United States* v. *McHie*, 196 Fed. 586 (N.D. Ill.); *United States* v. *Johnson*, 76 F. Supp. 538, 542 (M.D. Pa.); *Application of Bendix Aviation Corp.*, 58 F. Supp. 953 (S.D.N.Y.); *United States* v. *B. Goedde*, 40 F. Supp. 522, 534 (E.D. Ill.).

The instant case falls within each of these categories. First, as the government explained to the district court, there is substantial risk, predictated on past experience, that if the documents are returned to the Union they might be lost or destroyed. Second, the records are needed in the the present criminal prosecution of the Union officials and the grand jury investigation into the Union's affairs. Third, they are needed by the parties, both by the government to prepare its case against the indicted officials, and by the officials themselves, who have obtained an order for discovery of them to prepare their defense.

Moreover, contrary to petitioner's contention, all of these considerations were properly before the district court and the court of appeals. The district court was well aware of the subpoena *duces tecum* of July 1972 and the needs of the grand jury that was then conducting an investigation under its supervision. It was also aware of the nature of the earlier grand jury's investigation and the two indictments that had been returned. In addition, these matters were all called to the attention of the court in the government's argument (Tr. 12-14, 17). Although the government did not formally introduce these court records (Pet. 27, n.5), this reference was sufficient since the court could take judicial notice of its own records (*Freshman* v. *Atkins*, 269 U.S. 121, 124; *United States* v. *Pink*, 315 U.S. 203, 216.). It also follows that it was, therefore, not error for the government to include a copy of the two indictments in its appendix in the court of appeals, or for the court of appeals to have placed some reliance upon them in affirming the decision below.

Finally, petitioner has failed to make any showing of a need in support of its motion for return of the records to its custody. Petitioner's counsel still has not offered any compelling reason why petitioner Union requires

the immediate return of these business records which are already two to seven years old and to which it has free access.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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